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Supreme Court of the United States

OCTOBER TERM 1934.

No. 469

HENRY L. DOHERTY & COMPANY, *Appellant*,

vs.

FRANK GOODMAN, *Appellee*.

APPEAL FROM THE SUPREME COURT OF THE STATE OF IOWA.

REPLY BRIEF.

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REPLY BRIEF.

This appellant relies upon the principles announced in the line of cases shaped by *Pennoyer vs. Neff*, 95 U. S. 714, and culminating in *Flexner vs. Farson*, 248 U. S. 289. The appellee relies upon the branch of this same line of cases culminating in *Hess vs. Pawloski*, 274 U. S. 352.

Every general rule has its apparent exceptions. These apparent exceptions are not denials of the rule, they are the logical operation of the principles of the rule when applied to special circumstances. They are assertions, not denials of the rule. We admit the apparent exception in cases where a non-resident corporation is defendant. The result reached in these cases is not a denial of the rule, it is an affirmance of the rights of a citizen, a refusal to grant those rights to one not a citizen. It is a refusal to recognize the powers of a sovereign beyond its borders, a recognition of the sovereign's powers over a fictitious entity which is present within its borders in the only way it can be present anywhere.

Hess vs. Pawloski was decided after *Flexner vs. Farson*, it does not overrule the earlier case and does cite it with approval. There is no conflict of doctrine in the two opinions and we can write the entire sum and substance of our brief from the *Hess* opinion:

> "The process of a court of one state cannot run into another and summon a party there domiciled to respond to proceedings against him. Notice sent outside a state to a non-resident is unavailing to give jurisdiction in an action against him personally for money recovery. * * * There must be actual service within the state of notice upon him or upon some one authorized to accept service for him. * * * A personal judgment rendered against a non-resident who has neither been served with process nor appeared in the suit is without validity. * * * The mere transaction of business in a state by non-resident natural persons does not imply consent to be bound by the process of its courts. * * * The power of a state

> to exclude foreign corporations although not absolute but qualified is the ground on which such an implication is supported as to them. * * * But a state may not withhold from non-resident individuals the right of doing business therein. The privileges and immunities clause of the Constitution § 2 Art. 4 safeguards to the citizen of one state the right 'to pass through or to reside in any other state for purposes of trade, agriculture, professional pursuits, or otherwise.'"

The principles announced in *Flexner vs. Farson* and in *Hess vs. Pawloski* are the same. They are the principles for which we contend. When these principles were applied to the facts in the *Farson* case, the holding was no jurisdiction. When they were applied to the special facts in the *Hess* case, the holding was proper jurisdiction. When they are applied to the facts in *Doherty vs. Goodman*, the holding will be according to the case with which the facts place the present case.

What are the facts which must control the result the application of the principles will produce?

1. Farson was never in Kentucky.

Hess was personally present within Massachusetts, personally participated in the accident giving rise to the cause of action.

Doherty was never in Iowa.

2. In *Flexner vs. Farson*, the service was pursuant to Section 51 of the Civil Code of Kentucky which provided in part:

> "In actions against an individual residing in another state, or a partnership, association, or joint stock company, the members of which reside in another state, engaged in business in this state, the summons may be served on the manager or agent of, or person in charge

> of, such business in this state, in the county where the business is carried on or in the county where the cause of action occurred."

This was a general statute applying to business of every nature when carried on by an agent.

In *Hess vs. Pawloski*, the service was pursuant to Chapter 90 of the Laws of Massachusetts. This was the chapter dealing with and regulating automobiles. Sections three and four of the chapter gave non-residents the privilege to drive automobiles over the highways of the state. A later section provided that if a non-resident accepted these privileges as evidenced by his driving an automobile under the circumstances they permitted, such acceptance should be deemed the appointment of the state registrar of automobiles as the non-resident's agent for purposes of service of summons in actions arising out of accidents or collisions in which the non-resident became involved while so operating the automobile.

This statute is a special statute, one part of a chapter regulating an instrument inherently dangerous and peculiarly subject to the police power.

Immediately after stating the controlling principles Mr. Justice Butler states:

> "Motor vehicles are dangerous machines; and even when skillfully and carefully operated their use is attended by serious dangers to persons and property. In the public interest the state may make and enforce regulations reasonably calculated to promote care on the part of all residents and non-residents alike, who use its highways."

We need not now argue the limits of police power. Section 11079 of the Iowa Code does not purport to be a police power statute. As shown by the dissenting opinion of Mr. Justice Morling in *Davidson vs. Doherty*, this section was

originally Section 1705 of the Code of 1851, and then was in the Chapter entitled Place of Bringing Suit. In the Revision of 1860, it was split into two parts, one of which was retained in the venue chapter, the other, the present section 11079, was put by the Code Commission in the Manner of Commencing Actions chapter, then chapter 120, in our present Code Chapter 489. This section is no part of our Iowa Securities Act. Securities Acts had not been heard of in 1851 or in 1860. When we did pass a Securities Act in 1927, it became Chapter 393 and as amended it is Chapter 393-C1.

If the sale of securities justifies the exercise of police power, if this power includes the right to provide a special manner of service of summons in actions arising out of such sales, then Iowa has provided such a service, and it avails naught for Goodman.

In our Securities Act, Chapter 393-C1 of our Code we find Section 8581-C9 which provides a special manner of serving original notice of actions arising from the sales of securities. No service pursuant to this section is before this court.

If Iowa had police power to provide a special manner of service in this case, Iowa has exercised this power in Section 8581-C9 of the Code. There is, and can be, no claim that the present service was made pursuant to this section.

Appellee should not argue for a police power based on fraud. No fraud is involved in this case. The petition does not allege fraud of any sort whatsoever.

On this point we find that *Flexner vs. Farson* condemned a general statute in the Civil Code which made an agent of a non-resident principal the agent for service. No police power was involved.

Hess vs. Pawloski sustained a section which was part of the chapter regulating automobiles and applied to a special class of cases because it was a proper exercise of a special police power.

Doherty vs. Goodman questions a general statute in the Civil Code which makes an agent of a non-resident principal the agent for service? No police power is involved. Section 11079 is the substantial equivalent of the Kentucky statute.

Again the facts place us with *Flexner vs. Farson.*

3. Farson was exercising his right to transact business in Kentucky by an agent. Kentucky could neither prohibit nor burden this exercise of Farson's right. Hess was exercising special privileges extended to him by Massachusetts. He was using a dangerous machine on the highways owned and maintained by the state. The state could properly regulate the exercise of the privilege it granted.

Kentucky offered Farson nothing and he received nothing from the Kentucky statute. His rights as a citizen of Illinois gave him all he ever had.

Massachusetts offered Hess privileges of value, the privilege of driving a dangerous machine on a highway owned and maintained at great expense by the state. The statute which offered the privilege demanded a reasonable consideration. In return Hess should appoint a reasonably convenient agent for service. Acceptance of the bargain offered by the statute brought both the privilege and the obligation, the one was ample consideration for the other.

Had Hess stayed on private tracks, the Massachusetts statute would not purport to affect him.

Doherty was exercising his right to transact business in Iowa by an agent. Section 11079 applies to every form of business. It imposes a burden upon all non-residents in every form of business, as did the Kentucky statute. Section 11079 offers no privilege, asks no agreement, gives no consideration for any consent to anything, express, or implied. If there is any consent, express or implied, in the present case, then it must be consent to be bound by Section

8581-C9 of the Securities Act, and no such consent is relied upon, or even claimed.

On this point also *Flexner vs. Farson* controls the present case.

4. The Kentucky statute made no provision that the agent served should forward the notice. The Massachusetts statute made provision that the agent would forward the notice. Section 11079 makes no such provision. We still match the facts in *Flexner vs. Farson.*

5. The Kentucky statute made no provision, so far as the opinion shows, to give a non-resident who lived at distance extra time to appear.

The Massachusetts statute provided for continuances sufficient to give Hess ample time.

Section 11079 is peculiarly vicious with respect to time. It must be read in connection with Section 11059.

> *11059* HOW LONG BEFORE TERM. The defendant shall be held to appear at the next term after service:
>
> 1. If served within the county where the action is brought in such time as to leave at least 10 days between the day of service and the first day of the next term.
> 2. If without the county but within the judicial district so as to leave at least fifteen such days.
> 3. If elsewhere so as to leave twenty such days for every one thousand miles or fraction thereof extending between the places of trial and service.

By section 11055, defendants must appear by noon of the second day of this next term or default will be entered and judgment entered thereon.

This service was had in Polk County, the county where the action was brought. Doherty had only eleven clear days. Polk County is a judicial district. The resident of an adjoining county served therein would have twenty-one days to

appear. Had Doherty been served in person in New York, he would have had forty-one days to appear. Any civilized community will give a person twelve hundred miles away more than eleven days to learn of a suit, employ counsel, instruct counsel as to the facts, prepare and file answer.

Section 11079 and the facts of this case present every point which caused this court to condemn the Kentucky statute under which a substantially similar service was made in *Flexner vs. Farson.* They do not present a single point, which rendered a different result in *Hess vs. Pawloski* a proper application of the established principles although an apparent exception to them.

The nature of our statute, the facts of our case place us well within the short but broad opinion of Mr. Justice Holmes in *Flexner vs. Farson.*

Respectfully submitted,

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